***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 76-2145

IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

BENJAMIN MALLAH,

*Petitioner-Appellant,*

—against—

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

# BRIEF FOR PETITIONER-APPELLANT MALLAH

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# BRIEF FOR APPELLANT BENJAMIN MALLAH

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## Preliminary Statement

The appellant Benjamin Mallah appeals from an order entered in the United States District Court for the Southern District of New York by the Hon. Milton J. Pollack, denying his petition pursuant to Title 28, United States Code, Section 2255, without a hearing on the factual claims raised. The order appealed from was entered on October 19th, 1976.

The conviction underlying the 2255 petition was entered on February 26th, 1974. After trial to jury, appellant was convicted of one count of violating Title 21, United States Code, Section 846. As a result of this conviction, appellant

was sentenced to the custody of the Attorney General, or his duly authorized representative, for a period of ten (10) years. In addition, a special parole term of three (3) years was imposed, together with a $25,000 fine. Appellant's conviction was affirmed by this Court in United States v. Mallah, 503 F.2d 971 (2nd Cir., 1974) and a petition to the United States Supreme Court for a writ of certiorari was denied; 420 U.S. 995 (1975).

## STATEMENT OF THE FACTS

In July of 1976, more than two years after sentence, Benjamin Mallah moved pursuant to Title 28, United States Code, Section 2255 for an order vacating his conviction on the ground that the government had violated his constitutional right to due process by deliberately suppressing evidence which would tend to impeach the credibility of one of the key witnesses against appellant, one Cecile Mileto. In order to best understand this post-conviction proceeding, it is necessary to review the facts which preceded it.[1/]

The theory of the government's case at trial was that Benjamin Mallah served as the financier of the now infamous Herbert Sperling drug operation.[2/] The government's proof

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1/ To a great extent, these facts are outlined in United States v. Mallah, 503 F.2d 971 (2nd Cir., 1974).

2/ United States v. Sperling, 506 F.2d 1323 (2nd Cir., 1974)

focused on the frequent transfer of large sums of money between Mallah and Sperling. This is not a case, however, where the defense rested on the alleged infirmities in the government's presentation. The defense established that Mallah was a well-known bookmaker with a diversified array of clients. (T 1323 - 1349)[3/] Testifying in his own behalf, Mallah acknowledged that as a bookmaker, he had taken bets in the Seventh Avenue vicinity for at least 25 years. (T 1366) Mallah testified that he had known Herbert Sperling for approximately three or four years, having met him in the vicinity of Seventh Avenue and engaged in gambling activities with him. (T 1368 - 1369) The defendant-witness flatly denied any involvement with the sale or distribution of narcotics. (T 1368)

Appellant submits that the case against him was considerably less than overwhelming.[4/] It is quite true that many witnesses placed Mallah in association with Sperling. However, there was very little non-hearsay evidence which connected Mallah to the drug trade. In fact, three substantive counts charging Mallah with violations of the narcotics laws were dismissed at the end of the government's case on the ground of insufficient proof. Indeed, in his final instructions to the jury, Judge Pollack stated that:

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[3/] The letter "T" refers to the trial transcript.

[4/] On direct appeal, appellant raised the issue of sufficiency of evidence.

> "There is no evidence in the record to support a statement that Mallah transacted business in cocaine or in heroin in the sense of dealing with the drug. The contention here is that he was the money man or backer, as you have heard it." (T 1726, 1727)

The one witness who gave the most damaging testimony against Mallah, insofar as that testimony was alleged to have demonstrated Mallah's awareness of, and intricate involvement in the narcotics trade, was Cecile Mileto. Cecile Mileto testified that in May, 1971, she lived with her husband Louis Mileto, a named co-conspirator who gained his livelihood by "cutting heroin". (T 37) Mrs. Mileto testified that her husband had at one time told her that his employer was Herbert Sperling. (T 38) The witness recalled that she first met Herbert Sperling in July of 1971 at his apartment in Lower Manhattan. (T 38) Subsequent meetings with Sperling occurred in a midtown barbershop which, according to later testimony, was the scene of conspiratorial meetings and at Sperling's home in Bellmore, Long Island. (T 38)

Mrs. Mileto also testified that she knew Benjamin Mallah. Although uncertain as to when she first met Mallah, the witness recalled that in December of 1971, while at the Sperling apartment, she observed Sperling counting $75,000 which was placed into an attache case and given to appellant. (T 49 - 50) According to the witness, Sperling stated to Mallah that "$75,000 isn't too bad a haul." (T 50)

After another witness had been taken out of turn (T 55 - 56), Mrs. Mileto resumed the stand and, in a most

extraordinary fashion, recalled another visit to the Sperling apartment at 5 Spring Street, with the appellant Mallah present. (T 204 - 205)[5/] The witness testified that at that meeting there were bags of white powder on the kitchen table and that as Sperling placed these bags into a shopping bag, Mallah was alleged to have said, "Are you going to have enough money for this?" (T 205) The shopping bag was then taken by the witness' husband and placed in the trunk of their car. (T 205)

The clearly framed issue at trial was whether appellant was the financier of Sperling's narcotics operation or whether he served innocently as Sperling's bookmaker. One of the most critical pieces of evidence which, in the eyes of the jury, transformed appellant from one who merely associated and exchanged money with Sperling to a principal in the narcotics operation, was the testimony of Mrs. Mileto that Mallah was present when white powder was on Sperling's kitchen table. Obviously, therefore, the essential issue in this trial hinged in large part on the credibility of Cecile Mileto.

The instant 2255 petition was filed after appellant learned that the witness Mileto had perjured herself on significant facts which were highly relevant to her credibility. Plainly stated, lies by this very important government witness

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[5/] Cross-examination of Mrs. Mileto revealed that the account of a second Spring Street meeting had never previously been furnished to any investigative body or law enforcement official. (T 231)

prevented the jury from making a realistic appraisal of her testimony. It was further alleged in the court below that this perjury took on constitutional significance because government agents knew that portions of the testimony was false, yet suppressed that knowledge.

The facts which formed the basis of the 2255 petition in the court below were revealed in tape-recorded interviews with the author of a book about Cecile Mileto's life. Louie's Widow, Cecile Mileto with Dave Fisher, Playboy Press, 1975.

Cecile Mileto testified at trial to a history of criminal offenses and involvement with narcotics. However, she was quite specific about the fact that her addiction to drugs ended in March of 1973, when she began to cooperate with federal officials. (T 214 - 215) The crux of appellant's claim in the court below can best be presented by reference to counsel's affidavit in support of the 2255 petition.

> "This testimony [that Mileto's addiction to drugs ended in 1973] led the jury to conclude that the witness had somehow reformed and that this reformation served as an indicia of her credibility. Indeed, after a history of shocking and blatant drug abuse, the witness claimed to have escaped the shackles of drug dependency.
>
> 'Q I assume that now you have no interest in taking narcotics of any kind?
>
> A I take pills for nerves, which I am under doctor's care for.
>
> Q Other than that?
>
> A None.
>
> Q In other words, as you sit there now, you are completely cured of

all these drug problems that you have had?

A I have no habit.' (T 236)

14. Later admissions made to author Dave Fisher revealed a dramatically different picture of Mrs. Mileto's conduct between March of 1973 and the trial in December of 1973. These admissions gain constitutional significance because the Government agents 'covered up' these nefarious acts and in some cases created an overly permissive atmosphere which allowed these acts to take place. Indeed, as will be seen below, the agents' conduct was often as offensive as that of the witness.

15. Contrary to her testimony at trial, Mrs. Mileto admitted to author Fisher that her involvement with drugs continued right up to the time of petitioner Mallah's trial.

> 'So now I go back to Baton Rouge and Dawn has met a few boys through Blythe - Clyde and Jerry and of course they're into drugs. No heroin, but morphine and alot of pot, downers, things like that. Dynamite. I can get high now too.' (Tr. 30, tape 9, side 2)
>
> * * *
>
> 'Now I'm getting high with Dawn, her boyfriend Jerry and Clyde. Morphine. Alot of acid, mostly pot, but I wasn't smoking any pot. I didn't want any part of it. I like S once in a while, but I wasn't into them heavy. So now I'm gonna show them. I'm going to New York and hit a few doctors and get some downs off them. So I go to a doctor.
>
> A Are you getting money now?
>
> Yeah, I have money, there's plenty of groceries in the house. So I go to a doctor, Dr. Brown, and it just so happens I don't know where I am - I'm in the black section of Baton Rouge and it's a black doctor, and I rob his office. I clean him out of every barbituate he has.' (Tr. 34, tape 9, side 2)

16. The 'Dawn' referred to above is the witness' daughter, Dawn Mileto. Investigation by your deponent has revealed that the boyfriend 'Jerry' is one Jerry L. Haacks, who died of an overdose of morphine on May 8th, 1973. Mr. Haack's death is relevant to this proceeding because it appears that this witness, the woman who testified at trial that she was only taking pills for her nerves, administered the fatal dose of morphine.

> 'Jerry and Dawn are fighting now - Jerry is shooting morphine like crazy, and I'm getting him off. Hitting him, because he can't hit himself. Well, he'd tie himself up and I put the needle in his arm. I don't know that the kid's got a stomach full of barbituates. I know he's high, but I don't know what on - and we're all doing everything anyway - barbituates, morphine. Cheryl comes one morning screaming, Maw, come over to Jerry's apt., hurry up, we can't move Jerry.'
>
> * * *
>
> 'So I clean house with the kids, get every set of works in the house out of there. But that's not an offense. In Baton Rouge, a set of works, I didn't know that. I figure it was like NY. So we clean out the whole house of every drug, Jerry had a pocketful of morphine, we took that over to my house, the works, the barbs, pot, everything. We called the police.
>
> Now his sister was saying I murdered Jerry. He couldn't hit himself in the arm.'
>
> * * *
>
> 'They can't make a case because he had used drugs and nobody's saying that I was the one who gave him the last shot or anything like that.
>
> Q Which in fact you were?
>
> Probably - he may have gone home and somebody else had gotten him off, but as far as I know, I gave him the last shot.' (Tr. 34 - 36, tape 9)

17. Jerry Haacks it seems was Cecile Mileto's partner in morphine.

'I don't feel I murdered him, that's for sure - maybe he took a couple of more barbituates after it, I don't know. But we had gone partners and had bought alot of morphine - 90 tabs of morphine. And he had quite a few of them left in his pcoket, which I took when I cleaned house and the barbs - whatever was left, I took to my house.'

18. The death of Jerry Haacks, according to the witness, led to another incident where she was arrested for the distribution of Seconals, a fact which was disclosed at trial. However, this disclosure was a far cry from what actually was happening during this time.

'But my kids are spending my money as quick as I can make it - Dawn and her boyfriend are dealing drugs so I don't have to buy anymore - got a little speed and a little coke - anything you really want, but if there's nothing else around to get high on, you can always go out in the fields and pick some mushrooms.' (Tr. 83 - 84)

19. At trial, Mrs. Mileto categorcially denied that she injected drugs into her veins.

'So am I correct then from March, 1973 until the present day you injected no drugs into your veings?

A March of '73?

Q That is correct, until today?

A Until today, yes, that is correct.' (T 214)

During the interview with author Fisher, the witness revealed the following:

'Now Cheryl gets married - everybody else is in school, except for Dawn - she decides to quit school. Mark is dealing his pot all over the place, always buying grass - really stoned. Then he decides he's going to start getting high with everybody else with Towelum - a drug that's very popular in Baton Rouge. And it's very easy to obtain down there, you just call a dentist and tell him I have an abscess and he'll call in a prescription, it's morphine ex-

tract and you cook it down and it's good - very good. So Mark is shooting T. You shoot it. Cheryl and I are shooting and Dawn starts getting off herself. (Tr. 80 - 81)

20. It is important to note that Mrs. Mileto's children share her taste for hallucinogenic and mood drugs. In fact, these interviews reveal that Mrs. Mileto's son Mark, who testified against petitioner Mallah during the Government's rebuttal case, was using Government monies to invest in the drug business.

'Mark went in a second time after I testified - they brought him in again by himself and Mark had a blast. It was just before Christmas last year and he made about $400 and he put it right in the pot business and bought himself a pound of grass and a mess of acid and doubled his money up and partied - he must have had money in his pocket - even after Christmas shopping, because he doubled and tripled his money.'

21. There can be no question but that the Government agents well knew about Mrs. Mileto's involvement in drugs and, therefore, that her testimony that she took only nerve pills was false. It was the agents who came to Louisiana to straighten out Mrs. Mileto's troubles.

22. A casual observer may wonder how a witness, guarded by the Government's relocation program, was so easily able to continue her involvement with drugs. The tone of Mrs. Mileto's moral responsibility during this period was apparently set by the Government agents. According to Mrs. Mileto's interviews with author Fisher, Government agents engaged in drinking parties with the witness where, on one occasion, an agent started shooting a gun owned by the witness' son. (Tr. 41, tape 10, side 1) Mrs. Mileto also revealed that on occasion she carried the agents' guns.

'They'd take me to dinner and I'd carry their guns.' (Tr. 31, tape 9, side 2)

These same agents swam with the witness semi-nude during the months prior to trial. (Tr. 42, tape 10, side 1) One of the United States Marshals assigned to guard the witness and her family, according to the tape transcripts, offered the witness' daughter Dawn $20.00 to engage in a sexual act with him. (Tr. 73, tape 11, side 1)

On another occasion, Mrs. Mileto admitted that she stole things from a resort and placed the stolen items in the trunk of a Marshal's car. (Tr. 42) Later, it was revealed that Mrs. Mileto was self-impressed with her cleverness in obtaining drugs by making misrepresentations to pharmacists and then charging these drugs to the Drug Enforcement Administration. (Tr. 86)

23. Through the witness' own candid admissions, petitioner has presented a most distressing picture of Cecile Mileto's conduct between the time she began to cooperate with the Government in March of 1973 and petitioner's trial in December of 1974. That picture is dramatically different that the picture presented by the witness through her testimony at trial. Whatever material defense counsel had to lodge an assault upon Mrs. Mileto's character and credibility would lose significance when compared to the evidence disclosed above. These taped interviews reveal that the Government had some degree of knowledge of what the true facts had been. This is not a case where the 'true facts' were merely cumulative. Here was a witness who had disclaimed any involvement with the drugs which previously had marred her life. The fact that this witness lied under oath, the very same oath which caused petitioner Mallah's conviction, requires that this conviction be vacated and the case set down for a new trial." (Shargel Affdvt., A 10 - 17)*[6/]

In response to this 2255 petition, the government submitted the affidavits of an Assistant United States Attorney, a New York City policeman and a Special Agent with the Drug Enforcement Administration.[7/] Stuart Stromfield, the Drug Enforcement Administration agent, stated in his affidavit that:

"At no time did Mrs. Mileto use any drugs

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6/ The affidavit, together with the 2255 petition, appears in appellant's appendix at pp. 3 - 17.

7/ These affidavits are contained in appellant's appendix at pp. 130 - 154.

* The letter "A" refers to appellant's appendix.

> in my presence nor did she ever indicate to me that she was using drugs at this time. (Stromfeld Affdvt., A - 149)

The precisely identical denial is contained in Patrolman Lino's affidavit. (Lino Affdvt., A 152 - 153) Plainly stated, the position of the government was that there was no knowledge, either actual or constructive, that Mrs. Mileto did not discontinue her use of drugs and further, that when examined closely, the facts revealed to author Dave Fisher were not inconsistent with her testimony.

> "The government submits that a review of the book, the interview transcripts and the Mileto trial testimony, fail to yield any substance to the claim that the witness perjured herself with respect to her drug use." (Parver affdvt., A 136)

## STATUTE INVOLVED

Title 28, United States Code, Section 2255 states as follows:

> " §2255. Federal custody; remedies on motion attacking sentence.
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion as from a final judgment on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

## QUESTION PRESENTED

1. Whether it was error for the district court to deny appellant's 2255 petition without a hearing?

## ARGUMENT

THE FILES AND RECORDS OF THIS CASE DID NOT CONCLUSIVELY SHOW THAT PETITIONER WAS ENTITLED TO NO RELIEF; THE DISTRICT COURT ERRED IN NOT GRANTING A HEARING IN ACCORDANCE WITH STATUTE.

In denying the instant petition without a hearing, the district court relied upon four stated reasons.[8/] The first reason set forth is that the affidavit allegedly contained "not a scintilla of evidence that the witness lied when she testified that 'now,' i.e., at the time of the trial, she had no narcotics with her or where she was living, and that 'now' she had no interest in taking narcotics; and that she no longer had a drug habit. The brief segment of the interview transcript devoted to the period of petitioner's trial makes no reference at all to use of drugs during that time. A fortiorari, the transcript contained no evidence that the government knew about any such drug use and suppressed that knowledge."

The district court's emphasis on the condition of the witness' drug habit at the precise time of trial is, it is respectfully submitted, notably disingenuous. This unwarranted emphasis on the time of trial stems from a particular series of questions which, again with all due respect,

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[8/] The district court's opinion appears in appellant's appendix at p.155.

are taken out of context. At page 236 of the trial transcript, defense counsel inquired:

"Q Are there any narcotic drugs with you right now?

A No, there are not.

Q Are there any where you are living?

A No, there are not.

Q I assume that now you have no interest in taking narcotics of any kind?

A I take pills for my nerves, which I am under doctor's care for.

Q Other than that?

A None."

Petitioner's claim, however, was much broader than the questions set forth above. The witness, in earlier testimony, made it quite clear that from March of 1973 to the time of trial, she did not inject drugs into her veins and was not addicted to drugs. (T 214 - 215)

Secondly, the district court found that the affidavit "furnishes no evidence to support an inference that the two investigative agents were aware that the witness had used hard drugs or had injected drugs, between March 1973 and the trial." (Dist. Ct. Op., A 157)

It is quite true that the affidavit did not contain direct admissions that the agents had actual knowledge of Mrs. Mileto's drug abuse during this period and, in turn, of her perjurious testimony at trial. However, every surrounding fact

and circumstance strongly suggests that the government agents did have this knowledge. It is precisely this reason that a hearing was in order.

At the most critical period of drug abuse during the period of March, 1973 to the time of trial in December of 1973, it was necessary that Gerald Lino, a New York City policeman, travel to Baton Rouge, Louisiana together with an agent of the Drug Enforcement Administration in order to clear up Mrs. Mileto's problems. Why, one might ask, would a New York City police officer travel to Louisiana for the ostensible purpose of attending the witness' complaints about a lack of funds and inadequate service she was receiving from the United States Marshal? Agent Stromfeld, in his affidavit submitted in response to the instant petition, stated that his visit to Louisiana was "prompted by telephone calls we had received from Mrs. Mileto and her children who were complaining that they were not receiving sufficient funding from the marshals." (Stromfeld Affdvt., A 147) Both Stromfeld and Lino swore in their affidavits that they learned of Mrs. Mileto's arrest when they arrived in Louisiana. Both then stated that Mrs. Mileto told them that she had nothing to do with the boy's overdose. (Stromfeld Affdvt., A 147; Lino Affdvt., A 152) In the interviews with author Fisher, however, Mrs. Mileto stated that she called the agent and the police officer as a result of Jerry Haack's death. (Tape interview, p.38, tape 10, side 1; A 61)

It is clear from these facts and circumstances that there was good cause to believe that these two investigative officers had knowledge at this time of Mrs. Mileto's involvement with drugs. It is submitted that it was incumbent upon the district court to hold an evidentiary hearing so that these issues could have been explored.

The district court further concluded that the affidavit in support of the petition was insufficient because "the transcripts quoted in the affidavit in this case are hearsay which is almost devoid of probative value. They are unfocused, rambling, and difficult to follow. It is frequently difficult to determine the particular point in time to which specific passages of the transcripts relate. Manifestly, petitioner has not satisfied the requirement that he set forth specific facts which he is in a position to prove by competent evidence." (Dist. Ct. Op., A 158 - 159)

Whether or not these statements are hearsay,[9/] is simply not the point. In reviewing these interview transcripts, one thing comes across rather clearly. That is that author Fisher was dealing with a far more relaxed and candid subject than the attorneys who examined and cross-examined Mileto at trial. Although rambling and obviously not confined by formal rules of evidence, Mrs. Mileto's admissions to author

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9/ See, Federal Rules of Evidence, Rule 801(d)(2)(A).

Fisher are inherently trustworthy. In any event, it should seem clear that if a hearing were afforded, it is not the tapes which appellant Mallah would seek to introduce into evidence. With the subpoena power which would attach at such a hearing, appellant would be able to call Mrs. Mileto and the two investigative agents in order to determine whether in fact she had testified falsely and, moreover, whether the investigative agents knew that she had done so.

In concluding his opinion, Judge Pollack found that:

> "Petitioner has presented no basis from which this court can conclude that the alleged evidence of gross misconduct and mendacity allegedly knowingly suppressed by the government could have been reasonably likely to affect the witness' credibility. The jury was told that for four years prior to March, 1973, the witness had had a 'bad habit', mainlined heroin, used 'just about every drug,' and supported herself by 'illegal means'." (Dist. Ct. Op., A 159; emphasis supplied)

This was precisely petitioner's point. The jury, as noted in the supporting affidavit, was led to believe that this witness, except for the fact that she continued the use of soft drugs, had somehow rehabilitated herself and was testifying in furtherance of that effort. This was simply not the case. This witness' post-March, 1973 behavior was no less corrupt than the pre-1973 time period. Given the circumstances, it was quite reasonable to draw the inference

that the agents had knowledge of this.[10/]

On this appeal, appellant submits first, and perhaps most importantly, that if the allegations contained in his petition were proven, i.e., that the witness perjured herself with the knowledge of the government, he would be entitled to a new trial. Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. State of Kansas, 317 U.S. 213 (1942); Giglio v. United States, 405 U.S. 140 (1972); Napue v. State of Illinois, 360 U.S. 264 (1959). Napue is quite instructive on this matter as it states that:

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10/ In a subsequent trial at which Mrs. Mileto testified, United States v. Collier, et al., 76 CR 194, S.D.N.Y., on April 13th, 1976, she stated that she used both heroin and morphine after September of 1973. Moreover, she testified that she told government agents about her use of drugs. (Collier transcript, pp. 144 - 45) This fact is appropriately contained in footnote form because this was not presented to the district court and, accordingly, cannot be relied upon in this Court. It is quite curious that this testimony was apparently not disclosed to Judge Pollack and certainly not disclosed to appellant's counsel, who learned of it literally hours before this brief was prepared.

Moreover, Mileto's testimony at the Collier trial evidenced another startling inconsistency. As previously noted in the Statement of the Facts, the most critical part of Mileto's testimony was the second meeting with Mallah at Sperling's Spring Street apartment. At Mallah's trial, Mrs. Mileto testified that she saw Mallah in the apartment twice. Once in December of 1971, allegedly counting $75,000 and at a second, unspecified time when "white powder" was perched on Sperling's kitchen table. In the Collier trial, at p.102, the witness testified to seeing Mallah in the Sperling apartment once in December of 1971, while money was being counted: "Q Did you see Mr. Mallah at that apartment on any other occasion? A Not that I remember, no." In view of the suspect nature in which Mileto revealed the second Spring Street meeting, this would seem to be something more than mere failure of recollection. These circumstances, it is submitted, make even a stronger case for a remand.

> "The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such settled factors as the possible interests of the witness in testifying falsely that a defendant's life or liberty may depend."

See, also, Brady v. Maryland, 373 U.S. 83 (1963).

The decisions of this Court have made it clear that "intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction." United States v. Stofsky, 527 F.2d 237 (2nd Cir., 1975); United States v. Hilton, 521 F.2d 164, 166 (2nd Cir., 1975); United States v. Morell, 524 F.2d 550 (2nd Cir., 1975); United States v. Seijo, 514 F.2d 1357 (2nd Cir., 1975).

In this appeal, Benjamin Mallah contends that it was error that the district court denied his petition without an evidentiary hearing to explore the issues raised. Section 2255 provides in relevant part that:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

See, Fontaine v. United States, 411 U.S. 213 (1973). As in Machibroda v. United States, 368 U.S. 487, 494-95 (1962):

> "The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the government's response, related primarily to purported occurrances outside the courtroom and upon which the record could, therefore, cast no real light."

The same is true of the instant case. The allegations contained in the affidavit supporting Mallah's petition cannot be put to rest by the record. Moreover, it is well established that the affidavits in response to the petition cannot be used to deprive petitioner of a hearing.

> ". . .and opposing affidavits by the government is not part of 'the files and records of the case' which can be taken to 'conclusively show that the prisoner is entitled to no relief,' within 28 USC § 2255."

Taylor v. United States, 487 F.2d 307, 308 (2nd Cir., 1973). See, also, Walker v. Johnston, 312 U.S. 275 (1941); Waley v. Johnston, 315 U.S. 101 (1942).

The instant case is clearly not analogous to such decisions as Accardi v. United States, 379 F.2d 312 (2nd Cir., 1967) and Mirra v. United States, 379 F.2d 782 (2nd Cir., 1967), where the district court judges quite appropriately found that the record itself contradicted petitioner's allegations and conclusively showed that a hearing was not in order. Although Cecile Mileto was not the only government witness against the appellant, she was "highly instrumental in the conviction." Reagor v. United States, 488 F.2d 515 (5th Cir., 1973). Petitioner in the instant case has raised a colorable, non-frivolous factual question as to whether the government,

through its agents, knowingly condoned the use of perjured testimony. Plainly stated, the government must be charged with the knowledge of its agents. Barbee v. Maryland, 331 F.2d 842 (4th Cir., 1964); Giglio v. United States, supra; Santobello v. New York, 404 U.S. 257 (1971).

In summary, it should be said that the disposition of this appeal potentially plays an important part in the administration of criminal justice in this circuit. The government, and it is not suggested that it is out of choice, has in the prosecution of narcotics cases, relied on the most amoral witnesses who have ever testified under oath.[11/] This is not to suggest that these witnesses should be disqualified from giving testimony. However, given the reality of the situation, district court judges should be substantially more sensitive to serious, factual allegations that this type of witness has committed perjury. In other words, the standard of whether a hearing should be granted should be somewhat more flexible where the witness is one such as Cecile Mileto. The district court's opinion in the instant case certainly does not reflect that degree of sensitivity. Accordingly, appellant asks that this Court remand the matter for a hearing in accordance with Title 28, United States Code, Section 2255.

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11/ Witness the fact that this trial produced not only the testimony of Cecile Mileto, but also of Barry Lipsky, with whom this Court is well familiar. United States v. Sperling, supra; United States v. Mallah, supra.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court's order denying habeas corpus relief be reversed that the matter remanded for a hearing.

Respectfully submitted,

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